

# GIBSON, DUNN & CRUTCHER LLP

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December 1, 2003

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### **VIA ELECTRONIC FILING**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
The Portals  
445 12th Street, S.W.  
Washington, D.C.

Re: ***Notice of Ex Parte Meeting in WC Docket No. 02-361***

Dear Ms. Dortch:

On November 24, 2003, Deb Lenart, CEO of CNM Networks, Inc. ("CNM"), and I, Robert Metzger, as outside counsel for CNM, spoke with John Rogovin and others from the Office of the General Counsel, regarding matters related to the above-referenced proceeding.

In this conversation, I explained that CNM provides low-cost, high quality phone-to-phone Internet Protocol telephone services ("PTP-IPT") throughout the continental United States and that CNM relies upon competitive local exchange carriers ("CLECs") to originate and terminate calls delivered via CNM's private IP network. I noted that access charges for access to local networks are not applicable to Voice over Internet Protocol ("VoIP") under current Commission rules and that, for years, the VoIP industry has attracted investment and customers based on the Commission's decision to preserve VoIP's unregulated status through a policy of regulatory forbearance. Ms. Lenart and I described how, within the past few months, incumbent local exchange carriers ("ILECs") have begun to demand that CLECs pay access charges on calls delivered to or from CNM's gateways – notwithstanding the Commission's policy of forbearance toward VoIP and the absence of any Commission order authorizing such "self-help" by the ILECs. Responding to the ILECs' demands, CLECs that have, until recently, provided local service to CNM without billing CNM for access charges have begun to pass these charges on to CNM or to demand that CNM pay such charges even though they have may not been billed. In addition, several CLEC have restricted, terminated, or have threatened to terminate, local

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services to CNM based on their desire to avoid potential liability to the ILECs for access charges associated with these calls. I noted that, if left unabated, ILEC and CLEC access charge demands and the CLECs' increasingly frequent refusal to provide local services to CNM could prevent CNM from providing service to its customers and could potentially put CNM out of business. CNM had built its facilities, created its service offerings, and solicited its customers, in reliance on the belief that it could obtain "data service" rates for interconnection to the PSTN and that, as a former Enhanced Service Provider, it would be exempt from application of carrier access charges and other obligations imposed on common carriers.

I expressed my concern over the timeliness of Commission action on these questions which, as experienced by CNM, have become extremely pressing if not enterprise-critical. I advocated immediate action by the Commission to prevent "self-help" actions, as described above, from threatening the financial or operational viability of companies like CNM. While recognizing that the ultimate questions of whether, when and how to regulate VoIP were complex and could require some time to resolve, I said that the Commission should act to protect the nascent VoIP industry during the period of its rulemaking so that there would be new providers, like CNM, offering competitive services and technologies in the marketplace, and expressed concern that acting too slowly would extinguish such new providers and leave VoIP to the exploitation by ILECs alone. I said that this would not be consistent with the broad policies of the Telecom Reform Act of 1996 or the specific actions taken by the Commission since the 1998 Universal Service Report, including actions (such as statements in the Inter-Carrier Compensation NPRM) that appear to recognize the exemption presently afforded to VoIP from carrier access charges.

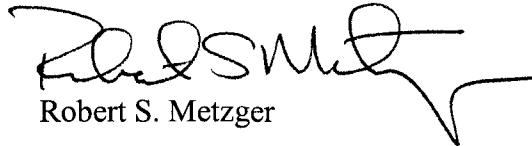
When asked about the relief that CNM sought, I discussed the pending AT&T Declaratory Relief petition. I commented that some of the concerns of CNM could be resolved by a prompt Commission decision on the AT&T Petition. Specifically, I urged that the Commission act immediately to preserve the *status quo* by issuing an order that VoIP, including PTP-IPT, is not subject to access charges pending further order of the Commission, in order that rulemaking or other proceedings could take their course without serious if not fatal injury being done in the interval by the unilateral actions of dominant market actors. Also, I explained the importance to CNM, and others similarly situated, including CLECs who provide local service access to VoIP providers like CNM, that the Commission articulate a ruling that there would be no retroactive liability for carrier access charges, applied to origination or termination of VoIP calls, and that if and to the extent any such obligation ever would attach to such calls, it would be prospective in application only. The urgency of the situation, and the need to protect non-incumbent VoIP providers, argues for the Commission's immediate attention.

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Pursuant to 1.1206(a)(i) of the Commission's Rules, this letter is being filed electronically with your office.

Very truly yours,



Robert S. Metzger

BPB/jt  
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cc: Chairman Michael Powell, Commissioner  
John Rogovin, Esq., General Counsel - Office of the General Counsel